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Supreme Court, U.S.
FILED
FEB 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-747

In The

Supreme Court of the United States

October Term, 1987

PAUL DUFFY and EUNICE DUFFY,

Appellants,

v.

CITY OF ARCADIA,

Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

MOTION OF APPELLEE CITY OF ARCADIA TO DISMISS

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42pp

QUESTION PRESENTED

Is a four-foot limit on the height of newsracks located on public property a reasonable time, place and manner regulation?

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ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT

MOTION OF APPELLEE CITY OF ARCADIA TO DISMISS

INTRODUCTORY STATEMENT

Because of Appellant Duffy's voluntary compliance with the regulation challenged, the case has become moot. If the Court determines the case is not moot, the only issue properly before the Court is whether Appellee City of Arcadia's regulation of the height of newsracks is a reasonable time, place and manner regulation. Unlike the other newsrack case pending before the Court, *City of Lakewood v. Plain Dealer Publishing Co.*, No. 86-1042, the

within case does not present the issues of a ban on newsracks, standardless discretion to deny newsrack permits or any other limitation which impinges on a newsrack owner's ability to place newsracks on public, or private, property. The California Court of Appeal correctly determined that the height regulation is valid on its face and as applied to Duffy. This case does not present a substantial federal question because the state court's decision is consonant with the opinions of this Court analyzing content-neutral time, place and manner regulations, including *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981), *City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984), *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41 (1986).

—o—

STATEMENT OF FACTS

On October 4, 1977, the City Council of the City of Arcadia held a public hearing to receive testimony on a proposed newsrack ordinance. Evidence was taken that newsracks obstruct pedestrian rights-of-way, obstruct vision between the sidewalk and the street, and present a disorderly and cluttered appearance. The City Council heard testimony from a number of newspaper owners and distributors. After hearing, the City Council enacted Ordinance No. 1615, codified as Arcadia Municipal Code Section 6439, regulating the size, placement and condition of unattended newsracks on public sidewalks (the "Ordinance").[1] Among its provisions is the four foot height limitation of subsection 6439(9) at issue on this appeal.

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[1] Portions of the Ordinance, not relevant here, were amended.

At the time the Ordinance was adopted, Duffy had been distributing newspapers in the City for over a decade in newsracks which conformed to the Ordinance. In November 1983, however, the City discovered that Duffy had removed 18 conforming newsracks in the City and had replaced them with newsracks which violated the Ordinance's height provision, not because they were so-called "Lowboy" (double-deck) newsracks, but because they were 5 feet high.

On July 20, 1984, and again on December 3, 1984, the City sent Duffy a letter advising him that the recently installed newsrack violated Section 6439(9) of the Arcadia Municipal Code relating to the height of newsracks (App. 1 through App. 4).[2]

On January 2, 1985, Duffy initiated this litigation seeking declaratory and injunctive relief on the grounds that the Ordinance violated the provisions of the state and federal Constitutions.

On January 29, 1986, the trial court held that the City had prevailed because the Ordinance did not violate the Constitution, except for subsection 24,[3] and denied Duffy's request for a permanent injunction.

Duffy appealed, challenging only the constitutionality of the height requirement of the Ordinance. On March 31,

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[2] At no time has the City asserted that Duffy's newsracks violated any provision of the Ordinance other than Section 6439(9).

[3] The Court of Appeal held subsection 24 to be invalid because it referenced "physical specifications kept on file"; however, such specifications (App. 5) have never been enforced (App. 7, 10, 11, 16).

1987, the California Court of Appeal filed an opinion upholding the facial and as applied validity of the height regulation. The Supreme Court denied Duffy's petition for review on July 1, 1987.

While Duffy's petition for review was pending before the California Supreme Court, a second action, *Rogers v. City of Arcadia*, No. CV 87-03450 (Kn), was filed in federal court on May 29, 1987, challenging the Ordinance on the same grounds as in state court. The District Court for the Central District of California granted the City's motion to dismiss on August 6, 1987, on the grounds of res judicata and collateral estoppel.

During the pendency of the litigation, injunctive orders were in effect which allowed Duffy to continue distributing newspapers in the nonconforming newsracks. In August, 1987, after losing in both state and federal courts, Duffy replaced all the nonconforming newsracks with ones that met the height requirement of the Ordinance. This was accomplished by mounting each of the previously nonconforming newsracks on shorter pedestals (Jurisdictional Statement at 7, n.5; App. 17, ¶ 6), an option which had been available to Duffy prior to and throughout the duration of this lawsuit (App. 18, 19, ¶ 5).

With the installation of the shorter pedestals, all of Duffy's newsracks substantially conform to the Ordinance. Duffy is now distributing his so-called "smaller less established" newspapers, as he has always been able to do, and as he has done, without interruption, since he began doing business in the City.

———o———

ARGUMENT

I.

THE APPEAL SHOULD BE DISMISSED BECAUSE THE CASE IS MOOT

In *Tiverton Bd. of License Comm'rs v. Pastore*, 469 U.S. 238 (1985), the Court held that a case involving liquor license revocation proceedings had become moot by the licensee's closing of business because no decision on the merits by the Court would have had any effect on the licensee's liquor license.

The sole issue in this lawsuit—the validity of the City's regulation of the height of newsracks—has become moot by Duffy's compliance with the height requirement of the Ordinance. After the decision of the Court of Appeal became final and the District Court action was dismissed, Duffy mounted the 18 nonconforming "Lowboy" newsracks on 8-inch pedestals. Shortly after Duffy replaced the pedestals, the City informed him, through his attorney, that the newsracks were in substantial compliance with the Ordinance, as placing the lowboy newsracks on 8-inch pedestals resulted in newsracks 49½-50 inches high (App. 20-21).

Because Duffy has complied with the Ordinance and continues to distribute newspapers in the City by means of Lowboy newsracks, a decision by this Court that the height regulation is invalid would have no effect on Duffy's distribution of newspapers in the City. Conceivably, Duffy could replace the recently installed mounts with the older, taller mounts if the height regulation were struck down, but "'"such speculative contingencies afford no basis

for . . . passing on . . . substantive issues . . . in the absence of 'evidence that this is a prospect of immediacy and reality' " ' ". *Tiverton*, 469 U.S. at 240. As a favorable decision by the Court would confer no tangible benefit on Duffy, the case should be dismissed as moot.

II.

THE CHALLENGED HEIGHT PROVISION IS A REASONABLE TIME, PLACE AND MANNER REGULATION

A. The Lawsuit Involves The Height, Not The Style, Of Newsracks

Duffy's assertions that this case involves the "style" of newsracks and that the Ordinance effectively permits only one style of newsrack are groundless. Nothing in the Ordinance prohibits the use of "Lowboy" newsracks.

The City's letter dated July 20, 1984, notifying Duffy that his newsracks violated the Ordinance, and which prompted Duffy to file the lawsuit, stated:

> The newsracks at the following locations in the City of Arcadia are in violation of the Arcadia Municipal Code, Section 6439(9). The Arcadia Municipal Code states "No newsrack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness." The double racks you have installed measure five (5) feet in height. (App. 1.)

At no time did the City contend that Duffy violated subsection 6439(18) of the Ordinance.[4] Throughout the trial phase of the lawsuit, the City argued that "Lowboy"

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[4] Subsection 6439(18) provides: "Newsracks shall have wood grain panels and the mount shall be painted gloss black."

newsracks would be permitted as long as they met the dimensional requirements of the Ordinance (App. 9-10).

Subsection 24 of the Ordinance which referenced newsrack "specifications" and which was found unconstitutional by the trial court, was not an issue on appeal and has never been enforced (see footnote 3). Further, these specifications by their terms do not prohibit the use of "Lowboy" newsracks (App. 5).

Throughout the duration of the lawsuit, Duffy had the option of placing the "Lowboy" newsracks on shorter pedestals to comply with the height requirement of the Ordinance (App. 18, 19), as he ultimately did (App. 17, ¶ 6, 20-21). Both of Duffy's attorneys discussed this solution with the City Attorney prior to and during the course of this lawsuit (App. 22-24) but, for some inexplicable reason, Duffy chose to initiate and continue to pursue the lawsuit to its conclusion rather than to use this inexpensive and readily available means to conform to the Ordinance.

B. A Four-Foot Limit On The Height Of Newsracks Meets The Test For A Content-Neutral Regulation

The California Court of Appeal correctly noted that the challenged portion of the Ordinance is undisputedly content-neutral. No evidence was presented at trial that the enactment of the Ordinance was in any way prompted by a desire to prevent the dissemination of "unpopular ideas." *Duffy v. City of Arcadia,* 195 Cal.App.3d 308, 311, 312 n.2, — Cal.Rptr. —, P.2d — (1987). (Jurisdictional Statement at A-18, A-19.)

As the Ordinance is content-neutral, the appropriate inquiry is whether it is designed to serve a substantial

government interest and allows for reasonable alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41; *City Council v. Taxpayers for Vincent*, 466 U.S. 789.

The Ordinance was enacted for safety and esthetic purposes. Traffic and pedestrian safety are traditional and legitimate subjects of a City's exercise of its police power, sufficiently substantial to sustain regulation of First Amendment activities. *See, e.g., ACORN v. City of Phoenix*, 798 F.2d 1260, 1268-1270 (9th Cir. 1986).

Esthetics also has been determined to be a substantial governmental interest which is unrelated to the suppression of ideas: "It is well settled that the state may legitimately exercise its police powers to advance esthetic values." *Vincent*, 466 U.S. at 805.

In *Vincent*, when addressing whether an ordinance prohibiting the posting of signs on public property was narrowly tailored to accomplish the government's stated purpose, the Court found significant the fact that the signs which were prohibited by the ordinance were "the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape . . . Here, the substantive evil—visual blight—is not merely a possible by-product of the activity, but is created by the medium of expression itself." *Vincent*, 466 U.S. at 810.

Like *Vincent*, in this case it is the medium of distributing the message, not the message itself, which is being regulated.

There is one significant difference between this case and *Vincent*. In *Vincent*, the ordinance which was upheld totally prohibited the plaintiffs from communicating with the public in a certain manner, and from this the Court

presumed that the ordinance diminished the total quantity of plaintiff's communication in the City. The Ordinance, in contrast, does not totally prohibit, nor diminish to the slightest degree, the ability of Duffy or any other person, to communicate in the City.

This is demonstrated by Duffy's action in conforming with the Ordinance merely by replacing the mounts on which the newsracks rest; apparently with little effort and expense. Alternatively, Duffy, and any other person, can distribute newspapers at any of the dozens of locations on private property in a conforming newsrack or in a nonconforming newsrack, an alternative avenue of communication which was found significant in *Vincent:* "[B]y not extending the ban to all locations, a significant opportunity to communicate . . . is preserved . . .". 466 U.S. at 811.

Duffy's reliance on *Jacobsen v. United States Postal Service,* 812 F.2d 1151 (9th Cir. 1987) and *Dills v. City of Marietta, Ga.,* 674 F.2d 1377 (11th Cir. 1982) is misplaced. In both those cases, the challenged regulation amounted to a total ban on a certain means of communication without support in the record of a compelling government interest. The Ordinance, unlike the federal statute in *Jacobsen,* does not "impose a substantial handicap on traditional use of a traditional public forum." *Jacobsen,* 812 F.2d at 1153. Unlike the record before the *Dills* court, the record here contains substantial evidence of esthetic and safety interests promoted by the challenged regulation.

Duffy's assertion that the City should be required to support the Ordinance by specific incidents of safety or

traffic hazard or injury caused by the newsracks has been repeatedly rejected by the Court. Similar arguments have been made to and rejected by the Court. *See, e.g., Clark v. Community for Creative Nonviolence,* 468 U.S. at 297. ["If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, . . . and if the parks would be more exposed to harm without the . . . prohibition than with it, the ban is safe from invalidation under the First Amendment . . ."] and *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. at —, 89 L.Ed.2d at 40 ["The First Amendment does not require a city, . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the City relies on is reasonably believed to be relevant to the problem that the City addresses."]

III.

THE INQUIRY FOR FIRST AMENDMENT PURPOSES IS NOT CONCERNED WITH ECONOMIC IMPACT

The mere fact that the Ordinance may make it more costly to do business does not amount to a First Amendment violation.

> "The inquiry for First Amendment purposes is not concerned with ecomonic impact; rather, it looks only to the effect of this ordinance upon freedom of expression." *Young v. American Mini Theatres,* 427 U.S. 50, 78 (1976) [Powell, J., concurring].
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> * * *
>
> "[W]e have never suggested that the First Amendment compels the Government to ensure that adult theatres, or any other kinds of speech related businesses for that matter, will be able to obtain sites at

bargain prices." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. —, 87 L.Ed.2d at 42.

That there is no absolute entitlement to the least expensive forum has informed or been expressed in cases involving several other First Amendment contexts. (*See, e.g., Kovacs v. Cooper*, 336 U.S. 77 (1949) [prohibition of sound trucks]; *City Council v. Taxpayers for Vincent*, 466 U.S. at 812 and n. 30 [prohibition of posting signs on public property]; *Braunfield v. Brown*, 366 U.S. 599 (1963) [not a First Amendment violation if regulation makes practice of religious beliefs more expensive]; *Lakewood, Ohio Cong. of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303 (6th Cir. 1983) [same]; *ACORN v. City of Phoenix*, 798 F.2d 1260 at 1271 [political group can be prohibited from engaging in most cost-effective method of fundraising].

The Court of Appeal correctly determined that Duffy had failed to discharge his burden of showing that the Ordinance unreasonably restricted any constitutional right because Duffy's evidence showed at most that compliance with the Ordinance may necessitate additional expenditures. The Ordinance permits Duffy to distribute newspapers at any one of the scores of permissible locations on public property as well as any one of the dozens of locations on private property. The above cases demonstrate that any increased expense of doing business is not a First Amendment concern where, as here, Duffy is left with ample alternative avenues of communication.

Duffy's assertion that the Court of Appeal erroneously placed the burden of proof on him to demonstrate the invalidity of the Ordinance is based on a misconstruction of the Court of Appeal's opinion. It is well-settled, as

the Court of Appeal recognized, that the burden is on the government to establish that a content-neutral time, place and manner regulation is designed to serve a substantial governmental interest and does not unreasonably limit alternative avenues of communication. *See City of Renton v. Playtime Theatres, Inc.*, 89 L.Ed.2d at 37, 39. It is apparent when the Court of Appeal's comment on evidentiary burdens is read in context that it was not referring to the burden of justifying the Ordinance. Rather, the Court of Appeals was commenting on the complete lack of evidentiary support in the record that Duffy would be harmed by enforcement of the Ordinance. As noted by this Court in *Clark v. Community for Creative Nonviolence,* "one seeking relief bears the burden of demonstrating that he is entitled to it." 468 U.S. at 293, n.5. That Duffy was not harmed by the Ordinance and that the Ordinance did not impinge on any First Amendment right is further supported by Duffy's action in using the simple expedient of replacing the mounts which has permitted him to continue to distribute newspapers from the same number of newsracks in the same locations as he had been doing prior to adoption of the Ordinance.

CONCLUSION

This case does not merit further expenditure of the Court's time. The Ordinance now, as it always did, allows "Lowboy" newsracks if they meet the height and other dimensional requirements of the Ordinance. Duffy's conduct in placing his "Lowboy" newsracks on shorter

pedestals has made the controversy academic. It has also negated Duffy's claims that the Ordinance's effect is "to drive out of Arcadia those smaller, less established newspapers that depend upon lowboy newsracks" or "severely handicap the distribution of certain newspapers" (Jurisdictional Statement at 13). Duffy's ability to distribute newspapers in "Lowboy" newsracks is not now and has never been affected in any way by the Ordinance. Duffy continues to distribute newspapers in the City in the same time, place and manner as he has been doing prior to and since the adoption of the Ordinance.

The height regulation—the only regulation which can be the subject of this appeal—is justified by safety and esthetic interests and has not in any way curtailed First Amendment rights. The City's motion to dismiss should be granted.

DATED: February 3, 1988

Respectfully submitted,

MICHAEL H. MILLER,
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APPENDIX

ARCADIA
(SEAL)

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Manager

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240 West Huntington Drive
Arcadia, California 91006
(818) 574-5400

City Council
David S.
Hannah
Mayor
Donald D.
Pellegrino
Mayor Pro
Tempore
Charles E.
Gilb
Mary Young
Dennis A.
Lojeski
Christine
Van Maanen
City Clerk

Received
July 20, 1984

City of
Arcadia
City Attorney

July 20, 1984

Mr. Paul J. Duffy
Kimbo Distributors
123 Huntington Street
San Fernando, CA 91340

Dear Mr. Duffy:

The newsracks at the following locations in the City of Arcadia are in violation of the Arcadia Municipal Code, Section 6439 (9). The Arcadia Municipal Mode states "No newsrack shall exceed four (4) feet in height, thirty (30) inches in width or two (2) feet in thickness." The double racks you have installed measure five (5) feet in height.

59 W. Las Tunas Drive
1440 S. Baldwin Avenue
1045 S. Baldwin Avenue
924 S. Baldwin Avenue
855 S. Baldwin Avenue
820 S. Baldwin Avenue
41 Wheeler Avenue
7 E. Huntington Drive

According to the Arcadia Municipal Code, Section 6439 (28) newsracks installed in violation of the provisions of this Section may be removed and stored by the City. Newsracks at the listed locations have been tagged for violations and will be removed if corrections are not made by July 27, 1984.

If you have any questions please call the Business License Officer, 574-5430.

Sincerely,

Becky Pike
Business License Officer

bp

cc: Mike Miller, City Attorney

ARCADIA
(SEAL)

CITY OF ARCADIA
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(818) 574-5407

Office of the
City
Attorney
MICHAEL
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City
Attorney

GEORGE J.
WATTS
Manager

December 3, 1984

Linda T. Abrams
Attorney at Law
991 W. Pico Blvd., Ste. 1000
Los Angeles, CA 90035

Re: Kimbo Distributors — City of Arcadia

Dear Ms. Abrams:

As you know, the newsracks of your client (Kimbo) located in the City of Arcadia are inconsistent with the height requirements imposed by the City's newsrack Ordinance. The so-called low-boy newsracks (double deck) all exceed the required height limit. Moreover, these newsracks have been placed in the City without a permit. Conforming newsracks should replace the low-boys and appropriate permits obtained.

Because of the logistics involved, we will accord your client until January 1, 1985 to provide conforming newsracks and obtain the appropriate permits. If this is not accomplished, a seven (7) day Notice to Remove will be sent out the week of January 1, 1985 and, if necessary, removal shall occur according to said Notice.

The City's Ordinance is a reasonable time, place and manner regulation, and it is hoped that your client will decide to comply with its requirements.

Please feel free to contact this office if there are any questions.

Yours truly,

/s/ Michael H. Miller
Michael H. Miller
City Attorney

MHM:lm
xc: City Manager
License Officer

App. 5

CITY OF ARCADIA
240 West Huntington Drive
Arcadia, California

December 1, 1977

SPECIFICATIONS FOR UNATTENDED NEWSPAPER RACKS

CITY OF ARCADIA

Each news rack to be mounted on a separate pedestal

No more than 4′ in height, 30″ wide and 2′ thickness

Racks to be of wood grained panels

Coin return

Racks to be K Jack model 100 miniview or National Newsvend Model 10 or equivalent.

Racks to be on K Jack Style mount or National Newsvend mount model 10 or equivalent.

Mounts to be bolted in place in accordance with specifications provided by the Public Works Department.

Mount to be painted gloss black.

SPECIFICATIONS FOR BOLTING NEWSRACKS TO CONCRETE

CITY OF ARCADIA

Drill holes (avoid subsurface utilities)

Put appropriate size expansion shield in hole

Appropriate size lag bolt

Bolt base to surface of concrete

J. Robert Sullivan
Business License Officer

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY,	)	
Plaintiffs,	)	
vs.	)	No. C 528 746
CITY OF ARCADIA, et al.,	)	
Defendants.	)	

REPORTER'S TRANSCRIPT ON APPEAL

January 29, 1986

APPEARANCES:

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YVONNE ENGHOLM, CSR No. 2160
Official Reporter

* * *

(p. 21) one of the footnotes in Kash indicates that they had the same depth and width requirement, the wood grain panels, the same locational requirements. The only difference there was the fact that there was a five-foot height requirement rather than a four-foot height requirement.

Second of all—

THE COURT: Did they require a particular design of rack?

MR. THORSON: The ordinance did not require a particular design, nor did the Arcadia ordinance require a particular design.

The specifications that plaintiffs' counsel referred to have not been enforced and have essentially been repealed by the City for a number of years.

THE COURT: Well, you do still have physical specifications on file in the business license office?

MR. THORSON: No, we don't.

The declaration of Becky Pike, who is the business license officer, indicated that, that the set of specifications has not—has not been applied, nor has it been enforced for a long time.

THE COURT: So you dispute the contention that Miss Abrams was advancing that it is necessary for anyone desiring to sell newspapers to have this type that has a big storage area?

MR. THORSON: That is correct.

The requirements of the ordinance say that the height shall be a maximum of four feet, that the depth shall (p. 22) be a maximum, certain maximum, and the width a certain maximum. That's to prevent huge newsracks that take up too much space on the sidewalk.

THE COURT: What about—excuse me for interrupting. What about, isn't there a requirement that all racks be of the same type?

MR. THORSON: When they are on a particular mount. In other words, if you have one pedestal and three racks, then those three racks have to be of the same type.

THE COURT: But you can build another pedestal?

MR. THORSON: That is correct.

Also, their arguments falls down when they say that Lowboy—that the double-decker newsrack that's in dispute is the answer for all of the small papers, that if you look at the pictures of it, has a large box on the bottom that is capable of supporting a great many newspapers. Then it has a small box on top. There is nothing in that that prevents a distributor or a manufacturer from constructing a newsrack that has two of the smaller boxes.

If the essential part of their argument is you need to have two boxes for two different newspapers, there is nothing in the Arcadia ordinance that prevents that from occurring. The only problem is that there is not a—the distributors have not constructed such a newsrack and have not installed it, but it is not a limitation of the ordinance that prevents that from occurring.

The ordinance was designed in the legislative history and indicates that the City Council was concerned

* * *

(p. 25) have two or three or four newsracks that sit there.

THE COURT: But the vender normally constructs a pedestal; is that correct??

MR. THORSON: That is correct.

THE COURT: And then he either constructs it for one or for a number of racks, depending upon what he has to sell?

MR. THORSON: That is correct, and whatever other agreements he may have entered into with other venders.

THE COURT: Well, in your interpretation, paragraph (17), which you say is not being enforced, relates only to the physical specifications of the pedestal; is that right?

MR. THORSON: That is correct.

THE COURT: Well, is there something else that requires the newsrack to be of a certain height?

MR. THORSON: No. That's our point entirely.

There are dimensional maximum figures that indicate that the newsrack may not be bigger than a certain amount. There is the requirement of the color and the color of the base. But within those parameters, there is nothing that says you can only have a particular type of newsrack.

Granted, the specifications at one time said, "The K-Jack Model 100 or its eqiuvalent," but those words there, "or equivalent," are critical.

If the market changes and other newsracks come on line that can conform to those requirements, that's the official word from the City under that now repealed regulation that those would be acceptable.

THE COURT: All right.

(p. 26) (24) says:

"Each news rack shall conform to the physical specifications kept on file . . . "

And you say there are no physical specifications?

MR. THORSON: That is correct.

MS. ABRAMS: There is disagreement in the record as to that, Your Honor.

MR. THORSON: Well, if I can address that, the declaration of plaintiffs' attorney, Linda Abrams, says she contacted the business license officer and asked for it or was told those specifications were in effect.

You also have a direct declaration from the business license officer saying, we don't enforce those regulations anymore.

And I think that the direct declaration of the business license officer is entitled to significantly more weight because there is nothing in the record that indicates what questions were asked of the business license officer, and I think you are going to get a different answer from the business license officer based on how the question is phrased.

If you say, can I see what regulation you have, then naturally, you are going to be handed regulations that were adopted in 1977.

If you say, what regulations are currently enforced as of December 1984, that's a totally different answer, and those verifications aren't reflected in Miss Abrams' declaration.

What is reflected in the declaration of Becky (p.27) Pike is the fact that those regulations are not in effect and have not been enforced for a number of years.

THE COURT: All right.

Miss Abrams, do you want to close?

MS. ABRAMS: Yes, Your Honor.

The Burbank litigation has been cited to this court, which resulted in a permanent injunction by Judge Murphy, as well, as the preliminary injunction and TRO's earlier granted, said on its face that the K-Jack Model 100 was required. As soon as that was enjoined, cities began trying to do factually what Arcadia has done here.

Alhambra's ordinance and Los Angeles' said—in fact, and it's just in the Council meeting transcribed here—said, we are going to require the Model 100 Miniview, but there is some litigation on that, so we are going to set up specs that only the Model 100 can match.

Quoting from the legislative history of Arcadia ordinance, page 6, line 25, to page 7, line 2—this is quoted at page 22 of my opening brief—City Attorney Liberto:

> "The ordinance does require that all existing newsracks on the street be of what is called the K-Jack Model 100 Miniviews or its equivalent."

It is therefore academic for us to discuss whether Becky Pike changed her story in response to the fact that this lawsuit was filed or not.

As to whether the physical specifications sheet

* * *

(p. 33) THE COURT: No.

I think, generally speaking, the Arcadia ordinance establishes reasonable time, place and manner regulations.

I think the words "clean, neat and attractive" should be construed, as was done in the Kash case, that "attractive" simply is an synonym for "clean and neat."

I do not think that even though Section (24) is not being enforced, that the existence of it on the books may provide something of a chilling effect. So I'm going to enjoin Section (24) of the ordinance.

But, I think, considering it as a whole, why—the City is the prevailing party; and if you'd prepare a form of judgment, please, Mr. Thorson.

MR. THORSON: I will, Your Honor. Thank you, Your Honor.

MR. MILLER: Thank you, Your Honor.

MS. ABRAMS: Your Honor—thank you, Your Honor.

Your Honor, may we ask that the judgment be stayed and preliminary injunction remain in effect for a very brief time to apply to the Court of Appeals to maintain the injunction in effect?

THE COURT: How long do you want?

MS. ABRAMS: 30 days.

THE COURT: Any objection to that?

* * *

(p. 35) SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

Department No. 59 Hon. Norman R. Dowds, Judge

PAUL DUFFY and EUNICE DUFFY,	)	
Plaintiffs,	)	No. C 528 746
vs.	)	REPORTER'S CERTIFICATE
CITY OF ARCADIA, et al.,	)	
Defendants.	)	

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, JEAN K. NISHIZU, do hereby certify:

That I am an official reporter of the Superior Court of the State of California, in and for the County of Los Angeles;

That I have transcribed the stenographic notes of YVONNE ENGHOLM, CSR No. 2160;

That the foregoing pages, 1 to 34, inclusive, comprise a full, true and correct transcript, to the best of my ability,

of said notes of the proceedings reported by said YVONNE ENGHILM, CSR No. 2160, in Department 59 on January 29, 1986 in the above-entitled action.

Dated this 12th day of August, 1986.

/s/ Jean K. Nishizu, CSR No. 1557
Offiical Reporter

MICHAEL H. MILLER
City Attorney
240 W. Huntington Drive
Arcadia, CA 91006
(818) 574-5407
Attorney for Defendants

SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY,	Case No: C528746
Plaintiffs,	DECLARATION OF R. PIKE
v.	DATE: September 25, 1987
CITY OF ARCADIA, and DOES I through VII, inclusive,	TIME: 9:00 AM
Defendants.	DEPT: 82

I, REBECCA PIKE, declare as follows:

1. I am the Business License Officer for the City of Arcadia, Defendant in the above action. As one of my duties I am charged with the administration and enforcement of the City's Municipal Code Section pertaining to unattended newspaper racks on public property in the City of Arcadia as adopted by Ordinance No. 1615.

2. I have personal knowledge of the following facts and other matters of official record of the City of Arcadia. I am competent to testify as to the truth of these facts if called as a witness.

3. The document referred to by Plaintiff as administrative regulations, was written in 1977 and has not been applied by this office for several years. The City of Arcadia does not specify any particular type of newsracks, make or model, and is asserting only a dimensional requirement consistent with the Municipal Code.

4. Height is measured from the ground to the top of the back of the standing structure. Newsrack height includes the rack and mount as an integrated unit. It does not include the coin box at the top of the newsrack. The coin box has never been included in the calculation of newsrack height.

5. Recently, when the California Supreme Court refused to hear Plaintiffs appeal, in reliance on the Court of Appeal opinion in favor of the City whereby the height dimensions concerning newsracks was sustained, I served Plaintiffs with the required notice to remove their non-conforming (illegal) newsracks which measured 60 inches (5 feet) in height.

6. In response to the notice referred to in 5 above, Plaintiff removed their non-conforming newsracks throughout the City of Arcadia and replaced them with double-deck (lowboy style) newsracks that measure approximately 49½ - 50 inches and are therefore in substantial compliance with the provisions and purpose of the Arcadia Municipal Code.

7. In August and September, 1987 various photographs of the conforming newsracks were taken and are included herein.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Arcadia, California on September 10, 1987.

/s/ Rebecca Pike
Rebecca Pike
Business License Officer

DECLARATION OF ALBERT P. GIMENEZ

I, ALBERT P. GIMENEZ, declare:

1. I am the President of National Newsvend, manufacturers and installers of newspaper vending equipment and parts.

2. Our "Lowboy" (Model 78) newsrack was originally designed for Dow Jones Publications, to accommodate The Wall Street Journal and Barrons (their papers) in one newsrack. Attached to this declaration is a page from our current catalog describing the "Lowboy" Model 78 newsrack.

3. The "Lowboy" newsrack is especially useful for those who distribute low volume newspapers. It is designed to be compatible with our Model 10 in appearance and size and comes in the same woodgrain color. It takes up the same space as a conventional Model 10 for example, but instead of having the large deep box of that model (commonly required by high-volume big newspapers), it can be used to dispense 2 different issues from the same newsrack at the same time. The "Lowboy" is one newsrack: it is sold and spoken of in the newspaper industry as one newsrack.

4. The other advantage of the "Lowboy", for the smaller publications is price: this basic newsrack sells for $164.95, a difference of $64.05 compared to the $229.00 cost of two conventional Model 10's. Adding to this the 50% difference in installation costs results in a total cost difference for a distributor of $82.00 each.

5. The "Lowboy" newsrack itself is approximately 45″ high, 26″ wide and 20″ deep. It can be installed on

the same standard pedestals (16" or 8") as our other models, or we can customize pedestals to any height.

6. It is my professional opinion that the "Lowboy" model is the most appropriate newsrack for distributors of low-volume or small newspapers.

7. We do not manufacture a single pedestal mount for 3 machines, and to my knowledge no one does. That arrangement would be completely impractical and not strong enough. When 3 machines are placed on one mount, we use 2 pedestals because it is a stronger and much more stable arrangement. Similarly, it would be foolish to place two on one pedestal next to a single pedestal mount since a 3-Bay on two pedestals would be far stronger.

I declare under penalty of perjury that the foregoing is true and correct and was executed on July 7, 1981 at —, California.

/s/ Albert P. Gimenez
President

CITY OF ARCADIA

240 WEST HUNTINGTON DRIVE
ARCADIA, CALIFORNIA 91006
(818) 574-5407

(SEAL)
GEORGE J. WATTS
CITY MANAGER

Office of the
City Attorney
MICHAEL H. MILLER
City Attorney

August 5, 1987

Mr. Donald W. Cook
Attorney at Law
1416 Second Street
Santa Monica, CA 90401

Dear Mr. Cook:

I have been advised that your client, Mario Rosso, intends to install various newsracks in the City of Arcadia. One such newsrack has already been installed at 240 W. Huntington Drive. If the newsracks to be installed at various locations in the City as noted by Mr. Rosso are comparable to that which has been installed at 240 W. Huntington Drive, you are hereby advised that these newsracks are substantially consistent with the dimensional requirements of the Arcadia Municipal Code. As long as the coin boxes on top of the newsrack structure are of limited width dimensions, their height is not calculated with regard to newsrack height. This has been the consistent administrative practice of this office over the years in applying the dimensional requirements to newsracks.

Since you were the attorney of record in the case of Duffy vs. Arcadia and Rogers vs. Arcadia both of which sustained the City's dimensional requirements for newsracks, you are well aware of the City's requirements and how we interpret same. You have been advised numerous times

that as long as double-deck newsracks met the height requirements there is no prohibition on a double-deck type rack in the City of Arcadia. We have even suggested in our legal documents that such a rack is capable of design and would be deemed to be conforming. Apparently, your client Mr. Rosso is following our suggestion and has provided a newsrack which is both double-deck and consistent with the City's height requirements. The newsrack provided by Mr. Rosso at 240 W. Huntington Drive measured from the ground to the rear portion of the top of the rack which is our customary measuring practice is consistent with the Arcadia Municipal Code as opposed to the newsracks previously maintained by your client Duffy which measured 5 feet in height and were clearly in violation of the City's dimensional requirements.

If there are any questions regarding the above, please contact this office.

Sincerely,
/s/ Becky Pike
Becky Pike
Business License Officer

BP:lm

MICHAEL H. MILLER, CITY ATTORNEY
CITY OF ARCADIA: AND
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SUPERIOR COURT OF THE
STATE OF CALIFORNIA FOR
THE COUNTY OF LOS ANGELES

PAUL DUFFY and EUNICE DUFFY, Plaintiffs, v. CITY OF ARCADIA, et al., Defendants.	Case No: C528746 DECLARATION OF MICHAEL H. MILLER *Hearing* DATE: November 20, 1987 TIME: 9:00 A.M. DEPT. 82

I, MICHAEL H. MILLER, declare as follows:

1. I am the full time City Attorney for the City of Arcadia. I have served in that capacity since January of 1983.

2. Consistent with my duties in the above position, after Plaintiff's removed their conforming newsracks and replaced them with nonconforming racks, and subsequent to attempts by City staff to seek the cooperation of Mr. Duffy, I advised him in writing as to the legal requirement

that he remove his newsracks for violating the City's height requirements.

3. In response to the letter notice to Plaintiff Duffy, I received a telephone call from Attorney Linda Abrams who represented herself as Plaintiff's legal Counsel. Attorney Abrams and I conducted various telephonic conversations regarding this matter prior to her filing subject action for a temporary restraining order and preliminary injunction. In those conversations I advised Ms. Abrams on numerous occasions that the only thing the City required was a rack that met the City's height requirement, that her client could use the same style as long as height conformed to City requirements. At no time were we concerned over the double-deck nature of the newsrack.

4. As a result of prevailing in this lawsuit Plaintiff has provided newsracks (albeit double-deck low-boy style newsracks) that meet the City's height requirement and therefore satisfy our concerns for uniformity, aesthetics and safety.

5. Throughout the litigation of this case and concomitant with Mr. Cook's entry into this case on appeal, he was also advised as to what was necessary to comply i.e. a newsrack that meets the City's height requirements.

6. Throughout the evolution of this case from its inception to now, the City has never questioned the propriety of the low-boy style newsrack. Plaintiff's failure to comply early on with the newsrack that he has now installed was done at his discretion, and does not formulate the basis for any fictional victory that would justify the funding of his legal fees either partially or in total by the taxpayers' of Arcadia.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in Arcadia, California on November 13, 1987.

/s/ Michael H. Miller
City Attorney